INTERIOR BOARD OF INDIAN APPEALS

Estate of Joshua Stone Arrow

10 IBIA 104 (09/28/1982)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF JOSHUA STONE ARROW

IBIA 82-33 Decided September 28, 1982

Appeal from order denying petition for rehearing by Administrative Law Judge Vernon J. Rausch. (IP TC 327S 79 and IP TC 191R 81)

Affirmed.

1. Indian Probate: Witnesses: Observation by Administrative Law Judge

   Where testimony is conflicting, the factual finding of the Administrative Law Judge will not be disturbed on appeal because he had the opportunity to observe and hear the witnesses.

APPEARANCES: Michael G. Figgins, Esq., for appellant Waldron Stone Arrow; appellee Darlene Stone Arrow Johnson, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On January 13, 1982, a petition for rehearing by appellant Waldron Stone Arrow was denied. The result of the denial was to affirm a prior order entered on January 20, 1981, finding that appellant was not the child of decedent, Joshua Stone Arrow, and was not entitled to inherit from the Indian trust estate left by him. The finding concerning appellant's relationship to decedent was based largely upon the testimony of appellant's mother, who, changing prior testimony offered in the probate of decedent's estate, testified on October 16, 1980, that appellant was not the child of decedent.

The testimony of appellant's mother establishes that she was twice married. Although never married to decedent, she lived with him for some time. She had several children by decedent, who permitted several children fathered by other men who were born to appellant's mother to use decedent's name. Appellant's mother explained her prior inconsistent testimony concerning appellant's paternity (to the effect decedent was appellant's father) by

stating that she believed decedent had done some official act at the Pine Ridge Agency which amounted to an adoption of appellant. Her testimony concerning this matter is not clear. There are no known records of an adoption by decedent of appellant, and no such records have been produced before this Board.

In his January 13 order, Judge Rausch clearly sets forth the conflicting evidence before him. His order recites that it is based upon his personal observation of witnesses appearing before him and his reasoned consideration of the evidence. He accepts the explanation offered by appellant's mother to account for her changed testimony based upon his observation of her and his analysis of the record as a whole.

[1] The record makes clear that the trier of fact was confronted by conflicting evidence in this case. He correctly based his decision upon his observation of the witnesses and his determination concerning their credibility. Where testimony is in conflict, the factual findings of the Administrative Law Judge will not be disturbed on appeal since he had the opportunity to observe and hear the witnesses. Estate of Abbott, 4 IBIA 12, 82 I.D. 169 (1975); Estate of Yumpquitat, 8 IBIA 1 (1980).

The fact-finder's decision is supported by credible evidence. The testimony of appellant's mother that decedent was not in fact appellant's father is consistent with the surrounding circumstances of appellant's birth established by the record as a whole. Much of appellant's argument that the denial of his petition for rehearing was error is grounded upon arguments based upon the presumption of legitimacy. The decision to deny him a rehearing in no way questions that doctrine: it simply finds that there is no legal or factual basis to support the application of the presumption in this case. 1/

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1/ Appellant erroneously contends the order denying reconsideration in Estate of Hall, 8 IBIA 73 (1980), provides the standard for review of orders denying rehearing. In Hall, the Board denied reconsideration of its own decision reported at 8 IBIA 53 (1980). In Hall, therefore, the issue was whether the petitioner had set forth a basis for reconsideration of the earlier Board decision. The rules respecting rehearing before Indian Probate Administrative Law Judges are set out at 43 CFR 4.241. Rehearing is also not to be confused with reopening: the rules respecting the latter, where persons without notice of the original proceeding seek to obtain a hearing after an estate has been finally closed, appear at 43 CFR 4.242. It is either from an order denying rehearing or denying reopening that appeal is taken to this Board. Appeals to the Board are governed by the rules published at 43 CFR 4.310-4.323.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 13, 1982, decision of the Administrative Law Judge denying appellant's petition for rehearing is affirmed.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Jerry F. Muskrat
Administrative Judge